

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Regulation of Prepaid Calling Card
Service Providers

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) WC Docket No. 05-68
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**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

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SUMMARY

In this notice of proposed rulemaking, the Commission seeks comment on the appropriate regulatory classification and jurisdictional status of two categories of prepaid card services: (1) a service in which the caller is given an option to dial digits in order to access “enhanced” offerings before placing any call to an end user (“Variant 1”); and (2) a service in which the prepaid card service provider provides transport for the call using IP technology (“Variant 2”).

In deciding these issues, the Commission must consider the impact of its decision on the payphone compensation requirement of Section 276 of the Communications Act, 47 U.S.C. § 276(b)(1)(A). Prepaid calling cards are one of the primary methods by which telephone calls are made from payphones, and conversely, payphones are a primary location for the use of prepaid cards. Although PSPs are entitled to compensation for prepaid card calls under the Commission’s dial-around compensation rule (47 CFR §§ 64.1300 *et seq.*) it has proven very difficult for PSPs to collect such compensation from the hundreds of reluctant payers that make up the prepaid card service industry.

As a result, this proceeding on regulation of prepaid card services is closely intertwined with the payphone compensation scheme. If the Commission classifies certain prepaid card calls as “information services,” many prepaid card service providers would hasten to exploit such a perceived “loophole” in the compensation rule, aggravating the problems PSPs already encounter in collecting dial-around compensation for calls completed by prepaid card service providers. To that extent, such rulings would contravene the statutory fair compensation requirement and frustrate the “widespread deployment of payphone services” required by Section 276 (*id.* § 276(b)).

Therefore, APCC proposes a regulatory classification model for prepaid card services that is supported by past precedent and that avoids encouraging false beliefs in an information services “loophole” in the compensation rules. Specifically, the Commission should rule that Variant 1 and Variant 2 services provided by prepaid card service providers are telecommunications services, not information services.

APCC also shows, however, that regardless of the regulatory classifications that ultimately apply to Variant 1 or Variant 2 prepaid card services, PSPs are entitled to compensation for all completed Variant 1 and Variant 2 calls. APCC therefore urges the Commission to issue, prior to or simultaneously with any ruling on regulatory classification of prepaid card calls, a clarifying interpretation or, if necessary, amendment of the compensation rule. The Commission’s ruling should make it clear that, even if some “enhanced” prepaid card service offerings are classified as information services, (1) any completed payphone call accessing such “enhanced” offerings is subject to the Commission’s payphone compensation rule, and (2) compensation for such calls must be paid by the prepaid card service provider. Such a ruling is necessary to mitigate the danger that a decision classifying certain prepaid card services as “information services” would encourage more widespread noncompliance with the compensation rule.

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The American Public Communications Council ("APCC")¹ hereby submits comments in response to the Commission's notice of proposed rulemaking in this matter.² In the *Order* accompanying the *Notice*, the Commission ruled on the regulatory and jurisdictional classifications applicable to a certain prepaid card service offered by AT&T. In this service, the caller automatically receives an unsolicited advertisement before completing a call using a prepaid card platform. The Commission ruled that (1) for purposes of regulatory classification, the service is a telecommunications service, not an information service, and (2) for purposes of jurisdictional classification, when the

¹ APCC is a national trade association representing about 1,200 independent (non-telephone company) payphone service providers ("PSPs"). APCC has participated in every major FCC proceeding affecting the payphone industry.

² *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Order and Notice of Proposed Rulemaking, FCC 05-41 (rel. February 23, 2005) ("Order" or "Notice").

caller is subjected to an unsolicited advertisement there is only one “relevant” call – the call placed to the ultimate called party – and the jurisdictional classification (as intrastate, interstate, or international) of that call is determined in the traditional manner, based on the locations of the caller and the called party.

In the *Notice*, the Commission seeks comment on the appropriate regulatory classification and jurisdictional status of two categories of prepaid card services that represent variants of the prepaid card service addressed in the *Order*. The first variant is a prepaid card service in which the caller is given an option to dial digits in order to access “enhanced”³ offerings before placing any call (“Variant 1”). The “enhanced” offerings in Variant 1 provide the caller with information (such as the number of minutes remaining on the card or the discounts available for goods sold by the retailer issuing the prepaid card) or the ability to perform certain functions (such as donating minutes to military personnel stationed overseas).

The second variant, a prepaid card service in which the service provider provides transport for the call using IP technology (“Variant 2”). The Commission also

³ The term “enhanced” is used here in the non-legal sense and as such is placed in quotation marks here and elsewhere in these comments. Although the service addressed in the *Order* is branded “Enhanced Prepaid Card (‘EPPC’) service,” the Commission determined that that service did not satisfy the legal definition of “enhanced service.” It remains to be determined which of the variant offerings discussed in the *Notice*, if any, satisfy the legal definitions of “enhanced service” or “information service.” Therefore, the term “enhanced” is placed in quotation marks in order to remind the reader that it has no legal significance as used. Because the legal definitions of “enhanced service” and “information service” are very similar, the term “information service” is generally used in these comments to refer services that satisfy the legal definitions of “enhanced service” and “information service,” thereby minimizing any confusion with the “Enhanced” brand name.

seeks comment on the regulatory classification of other kinds of “enhanced offerings” that may be offered by prepaid card service providers.

I. INTRODUCTION

In deciding these issues, the Commission must consider the impact of its decision on the payphone compensation requirement of Section 276 of the Communications Act. 47 U.S.C. § 276(b)(1)(A). Prepaid calling cards are one of the primary methods by which telephone calls are made from payphones, and conversely, payphones are a primary location for the use of prepaid cards. Although PSPs are entitled to compensation for such calls under the Commission’s dial-around compensation rule (47 CFR §§ 64.1300 *et seq.*) it has proven very difficult for PSPs to collect such compensation from the hundreds of reluctant payers that make up the prepaid card service industry.⁴

⁴ Attempts by switch-based resellers (“SBRs”) operating prepaid card platforms to avoid paying compensation to PSPs for payphone-originated calls have been a source of major disruption in the payphone compensation system, spawning dozens of FCC complaint proceedings and leading to two protracted rulemaking proceedings. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 17 FCC Rcd 19975, 19983-86 ¶¶ 18-24 (2003) (“Tollgate Order”). See also Comments of the American Public Communications Council on Further Notice of Proposed Rulemaking, Docket No. 96-128, Exh. 2, Declaration of Ruth Jaeger (June 23, 2003); Reply Comments of the American Public Communications Council on Further Notice of Proposed Rulemaking, Docket No. 96-128, Exh. 1, Declaration of Allan C. Hubbard (July 3, 2003). Although the current payphone compensation rule contains various audit and information reporting requirements designed to encourage compliance and support the collection of all compensation owed, there continue to be problems of noncompliance. In March 2005, APCC’s compensation collection clearinghouse APCC Services, Inc. issued demand letters to more than 200 SBRs, primarily prepaid card service providers, that APCC Services identified as having failed to pay any of the compensation they owed under the new rule.

As a result, this proceeding on regulation of prepaid card services is closely intertwined with, and is likely to have a major impact on, the ability of payphone service providers to be “fairly compensated for each and every completed intrastate and interstate call” originating from their payphones. 47 U.S.C. § 276(b)(1)(A). If the Commission, for the first time, classifies certain prepaid card calls as information services, many prepaid card service providers are likely to conclude that those categories of prepaid card calls are not subject to the Commission’s payphone compensation rule. Many prepaid card service providers would hasten to exploit such a perceived information services “loophole” in the compensation rule,⁵ aggravating the problems PSPs already encounter in collecting dial-around compensation for calls completed by prepaid card service providers. To that extent, such rulings would contravene the statutory fair compensation requirement and frustrate the “widespread deployment of payphone services” required by Section 276 (*id.* § 276(b)).

Therefore, in this proceeding, the Commission must carefully consider how its rulings on the classification of prepaid card services are likely to affect PSPs’ ability to collect the compensation to which they are entitled for calls made from payphones

⁵ For the reasons stated below in Sections III.A.3 and III.A.4, there is no “loophole” in the compensation rules for calls defined as “information services.” Nonetheless, it is clear that prepaid card service providers believe such a “loophole” exists. See Callipso Corporation, Motion for Extension of Time, CC Docket No. 96-128 (filed June 23, 2004); iBasis, Inc., Updated Submission in CC Docket No. 96-128 Addressing C.F.R. Section 64.1300 et seq. (filed November 24, 2004) (“iBasis Updated Submission”). As noted in the preceding footnote, numerous FCC rulemaking and complaint proceedings document the long history of efforts by prepaid card service providers to evade compliance with payphone compensation obligations.

using prepaid card services.⁶ In these comments, APCC proposes a regulatory classification model that does not conflict with past precedent and that also avoids encouraging false beliefs in an information services “loophole” in the compensation rules.

APCC also shows, however, that regardless of the regulatory classifications that ultimately apply to prepaid card services, PSPs are entitled to compensation for such calls. APCC therefore urges the Commission to issue, prior to or simultaneously with any ruling on regulatory classification of prepaid card calls, a clarifying interpretation or, if necessary, amendment of the compensation rule.⁷ The Commission’s ruling should make it clear that, regardless of the regulatory classification of prepaid card services, (1) any completed payphone call accessing a prepaid card service provider’s “enhanced” offerings is subject to the Commission’s payphone compensation rule, and (2) compensation for such calls must be paid by the prepaid card service provider. Such a ruling would mitigate the danger that a decision classifying certain prepaid card

⁶ The issues raised in this proceeding overlap with those raised by APCC’s recently filed petition regarding IP-enabled dial-around calling and payphone compensation. Petition of the American Public Communications Council for a Declaratory Ruling and Petition for Rulemaking to Establish That Payphone-Originated IP-Enabled Communications Are Subject to Payphone Compensation, RM ____ (filed March 23, 2005) (“APCC Petition”). In that petition, APCC requested a declaratory ruling and amendment of the Commission’s compensation rule to make clear that all IP-enabled dial-around calls completed from payphones are subject to compensation and that the service provider completing such calls is liable for the compensation payments owed to PSPs for such calls.

⁷ Although the *Notice* is styled as a notice of proposed rulemaking, the Commission could address at least some of the classification issues, as well as the related payphone compensation issues, by means of a declaratory ruling.

services as “information services” would encourage more widespread noncompliance with the compensation rule.

II. BACKGROUND

A. The Order

In the *Order*, the Commission made a number of rulings regarding a prepaid card calling service offered by AT&T in which the prepaid calling card platform plays an unsolicited advertising message for the caller before allowing the caller to dial a call.

First, the Commission ruled that the insertion of unsolicited advertisements into a calling card service does not “transform[] that service into an information service under the Act and our rules.” *Id.* ¶ 15. The Commission reasoned that providing unsolicited advertisements is not the “offering” of an information service “capability” as required by the definition of “information service.” *Id.* See also 47 U.S.C. § 153(20). In addition, the Commission determined that the provision of the unsolicited advertising message is an “adjunct-to-basic” service, and therefore not an “enhanced service” under the Commission’s rules, because the provision of the message is “incidental to the underlying [telecommunications] service offered to the cardholder and does not in any way alter the fundamental character of that service.” *Order* ¶ 16.

Second, the Commission ruled that provision of an unsolicited advertising message does not affect jurisdiction over the call. Rejecting the notion that the unsolicited advertisement resulted in two separate calls (one to the platform to receive the advertising message and one to the end user dialed by the caller) (*id.* ¶ 24), the Commission found that, for purposes of determining jurisdiction over the service at

issue, “the only relevant communication . . . is from the calling card caller to the called party” (*id.* ¶ 26).

B. The Requirement For Prepaid Card Service Providers To Pay Compensation For Calls Completed From Payphones

When a prepaid card service provider completes a call that originates from a payphone, the prepaid card service provider is required to pay the PSP “dial-around compensation. The dial-around compensation obligation is rooted in Section 276 of the Act. Section 276 of the Act requires the Commission to:

Establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for *each and every completed intrastate and interstate call* using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.

47 U.S.C. § 276(b)(1)(A)(emphasis added). Congress enacted this requirement to promote the “widespread deployment of payphone services” and to ensure that all carriers and customers who benefit from the availability of a payphone pay a share of the costs of the payphone:

Carriers and customers that benefit from the availability of a payphone should pay for the service they receive when a payphone is used to place a call.

H.R. Rep. No. 104-204, pt. 1, at 88 (1995).

A large percentage of the calls that originate from payphones are “dial-around” calls. A dial-around call is initiated when a caller dials a toll-free number (usually an 800, 888, 877, etc. number) from a payphone. Dial-around calls are “coinless” – the PSP receives no payment from the caller for the use of its payphone to make dial-around

calls. There are two types of dial-around calls: (1) “subscriber toll-free calls,” in which the caller dials a toll-free number in order to reach a business or person to whom that toll-free number belongs; and (2) “access code calls,” in which the caller dials a toll-free number belonging to a communications service provider in order to “access” the provider’s call processing platform, where the caller provides billing information and dials another number to complete the call to the intended called party. A large percentage of the access code calls made from payphones are made using prepaid calling cards.

In general, the Commission’s payphone compensation rules require the “Completing Carrier” for a dial-around call to pay compensation to the PSP for the use of the payphone. 47 CFR § 64.1300(b). In the 2003 *Tollgate Order*, the Commission adopted this rule in place of the previous compensation rule, under which the “first facilities-based interexchange carrier” had the obligation to pay compensation. *Tollgate Order*, 17 FCC Rcd at 19987, ¶ 26. The Commission rejected the earlier rule because, in situations where another carrier was responsible for completing the call, the Commission found it was unfair to impose the payphone compensation obligation on the first facilities-based carrier. In addition, where the first facilities-based carrier delivers an access code call to another carrier’s call processing platform, the Commission found that the first facilities-based carrier lacked the ability to track the call to completion. *Id.* at 19988, ¶ 27.

The “Completing Carrier” for a long distance call is defined as “a long distance carrier or switch-based long distance reseller that completes a coinless access code or

subscriber toll-free payphone call.”⁸ In general, the “Completing Carrier” is the carrier that has the billing arrangement with the party billed for the call. In the case of prepaid card calls, the billed end user is generally the caller.

There are various possible permutations of carriers that can be involved in a prepaid card call. In the simplest scenario, the payphone caller uses a prepaid card issued by an interexchange carrier (“IXC”) that owns its own long distance network. The caller dials the IXC’s toll-free number, and the originating local exchange carrier (“LEC”) hands off the call to the IXC’s facilities, which bring the call to the IXC’s call processing platform. At the platform, the caller usually enters the account number and/or PIN associated with its prepaid card and then dials the number of the intended called party. The IXC then routes the call over its own facilities and sends the call to the terminating LEC.

In another common prepaid card calling scenario, the payphone caller uses a prepaid card issued by a switch-based reseller of long distance service (“SBR”). The caller dials the SBR’s toll-free number, the originating LEC hands off the call to a facilities-based IXC, and the IXC routes the call to the SBR’s call-processing platform. The caller provides billing information to the SBR and dials the number of the intended called party. The SBR then routes the call over its own facilities or another carrier’s facilities and sends the call to the terminating LEC.

As described in the *Notice*, in some cases a prepaid card service provider (whether a facilities-based carrier or switch-based reseller) provides callers accessing its

⁸ *Id.* § 64.1300(a). The “Completing Carrier” for a local call is defined as “a local exchange carrier that completes a local, coinless access code or subscriber toll-free payphone call.” 47 C.F.R. § 64.1300(a).

platform with a prompt that allows the caller to dial a digit (or speak a word) in order to do something other than make an ordinary telephone call. In such cases, since the caller's intention is to gather information or perform a function offered at the platform, the call is more like a subscriber toll-free call⁹ than an access code call. In this situation, the caller is not attempting to reach another party – the prepaid card service provider itself is the called party. Therefore, the call is “completed” when the call is answered (either by a human or an automated response) by the prepaid card service provider.

III. DISCUSSION

A. Variant 1 Services

The *Notice* defines Variant 1 as a prepaid card service in which the caller is given an option to dial digits in order to listen to additional information (such as the number of minutes remaining on the card or the discounts available for goods sold by the retailer issuing the prepaid card) or perform additional functions (such as donating minutes to military personnel stationed overseas) before placing a call. *Notice* ¶¶ 11-12, 38.

⁹ With subscriber toll-free numbers, due to toll-free number portability, the toll-free number “belongs” to an end user rather than a carrier. The toll-free subscriber, through its Resporg (which may be the subscriber's carrier), has arranged to have a specific carrier handle its toll-free calls, and the originating LEC, after consulting the toll-free number routing data base, routes the call to the carrier designated by the subscriber.

1. Variant 1-type services should be classified as telecommunications services

Commission precedent supports classifying Variant 1 services as telecommunications services. Clearly, if the information or function that the caller can access by dialing digits is closely related to the telecommunications service(s) offered at the platform (for example, the number of minutes remaining on the card), the service must be classified as an “adjunct-to-basic” or telecommunications service.¹⁰ Even if the information or function offered is not directly related to the caller’s use of the telecommunications service (for example, information about discounts offered on other products by the prepaid card retailer, or the option to donate minutes to overseas military personnel), these functions are incidental to the main purpose of the service, which is to enable the subscriber to make telephone calls.

A ruling that Variant 1 services are “telecommunications services” would also prevent disruption of the payphone compensation system. As noted in Section I. above, if the Commission ruled that Variant 1 services are “information services,” prepaid card service providers would be encouraged in the false belief that such services are exempt from the payphone compensation rule. Some prepaid card service providers apparently interpret the rule’s requirement for compensation to be paid by “Completing Carriers” to mean that any offerings classified as information services are exempt from the compensation rule. See note 5 above. For reasons stated in Sections III.A.3 and III.A.4 below, this interpretation is incorrect. Nonetheless, a Commission

¹⁰ See, e.g., *The Time Machine*, Memorandum Opinion and Order, 11 FCC Rcd 1186, 1192-93 ¶ 40 (Com. Car. Bur. 1995)(“*Time Machine*”)(provision of information regarding the time remaining on the card is “incidental to the provision of basic communications services, and therefore is not an enhanced service”).

ruling that some prepaid card services are information services is likely to encourage prepaid card service providers to avoid compliance with the compensation rule in reliance on the spurious information services “loophole,” thereby making the collection of compensation substantially more difficult.

By contrast, a rule that classifies Variant 1 services as telecommunications services would avoid causing further disruption of the payphone compensation system. In short, it would serve the purposes of the Act to classify prepaid card calls as telecommunications services based on the primary function of the card.

2. A decision to classify “enhanced” offerings as information services should not affect the telecommunications service classification of the underlying service

Even if the Commission classifies certain Variant 1 “enhanced” offerings as information services, that should not alter the “telecommunications service” classification of calls placed to end users using a Variant 1 service platform. Such calls should continue to be classified as telecommunications services. In the *NATA Reconsideration Order*,¹¹ a service that allowed centrex subscribers to generate information to bill their clients for calls was classified as an information service. Classifying that service as an information service, however, did not mean “that every call made by subscribers using the information service somehow would be deemed [enhanced], because the service “was offered separately from the telecommunications

¹¹ *North American Telecommunications Association Petition for Declaratory Ruling Under § 64.702 of the Commission’s Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF 84-2, Memorandum Opinion and Order, 101 FCC 2d 349 (1985) (“NATA Order”), recon., 3 FCC Rcd 4385 (1988) (“NATA Reconsideration Order”).

service.” *Order* ¶ 19.” The information service component was not an integral part of the service. Similarly, the accessing of optional “enhanced” offerings is not an integral part of the prepaid card service. Callers can use the prepaid card to make calls without accessing “enhanced” offerings. Consequently, the Commission should rule even if the Commission classifies some “enhanced” prepaid card service offerings as information services, calls placed to end users from the prepaid card platform continue to be classified as telecommunications services.

3. Information service calls are subject to payphone compensation

If the Commission does classify certain calls accessing “enhanced” prepaid card offerings as information services, the Commission can and should rule that calls accessing such offerings are subject to payphone compensation. Section 276 requires the Commission to ensure fair compensation for “each and every completed . . . call,” without any distinction based on the regulatory classification of the call. Similarly, the Commission’s compensation rule’s coverage of dial-around calls is not limited by the regulatory classification of the call. If the compensation rule did somehow exempt information services calls from compensation, the rule would conflict with the statutory requirement of fair compensation for “each and every” completed call.¹²

¹² Regardless of their classification, calls made to “enhanced” offerings are clearly “completed” calls for purposes of the payphone compensation requirement. The fact that the call may be free to the caller does not change that fact. Just as calls made to an airline information data base (e.g., to determine the status of a flight) are “completed” calls because they are answered by the intended called party, calls to a service provider’s data base (e.g., to obtain information about minutes remaining on a card) are also “completed calls” because *they* are answered by the intended called party.

Because it does not differentiate among calls, Section 276 provides clear authority for the Commission to “regulate” information services to the extent of requiring the providers of information services to compensate PSPs for the use of their payphones. Even if the Commission’s authority under Section 276 was insufficient, however, the Commission’s ancillary Title I jurisdiction over information services authorizes the FCC to regulate information services to the extent necessary to ensure fair compensation for the use of payphones.¹³

4. Compensation for information service calls must be paid by the prepaid card service provider

If the Commission rules that for calls accessing a prepaid card service provider’s “enhanced” offerings are information services, the Commission should also rule that payphone compensation for such calls must be paid by the prepaid card service provider, rather than by the carrier that delivers such calls to the prepaid card service provider.

The alternative would be to rule that compensation must be paid by the carrier that delivers such calls to the prepaid card service provider. In order to ensure that PSPs are fairly compensated, it must be feasible for PSPs and others to determine which service provider has the obligation to pay compensation to the PSP. If the Commission ruled that compensation for calls to “enhanced” offerings must be paid by the carrier delivering the call to the prepaid service provider, then it would be extremely difficult, if not impossible, to determine which entity has the compensation obligation.

¹³ See, e.g., *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 ¶ 27 n.95 (2004), and cases cited therein.

For example, the carrier who delivered calls to a prepaid service provider's call processing platform would not be able to determine whether the caller used the platform to place a call to an end user (in which case the prepaid card service provider would be a Completing Carrier liable to pay compensation) or to access the prepaid card service provider's "enhanced" offerings (in which case the carrier delivering the call would be the Completing Carrier liable to pay compensation). The toll-free number dialed (which is all the carrier would have to go on) would be the same in either case. If the delivering carrier was liable to compensate PSPs for information services, while the prepaid card service provider was liable to compensate PSPs for telecommunications service calls made to the same number, the complexity of administering the compensation system would be greatly increased, and PSPs would be more likely to go uncompensated for many of the calls completed from their payphones.¹⁴

It is not necessary for the Commission to amend the compensation rule in order to ensure that prepaid card service providers pay compensation for payphone-originated calls that access a provider's information services. The compensation rule does provide that compensation will be paid by the "Completing Carrier." As discussed in Section III.A.2. above, however, the primary service offered with a prepaid card – the ability to call end users – remains a carrier-provided telecommunications service even if certain "enhanced" offerings available from the same platform are

¹⁴ Furthermore, as noted above, the Commission's *Tollgate Order* was based on the principle that carriers should not be required to pay for calls that they do not complete and are unable to track. *Tollgate Order*, 18 FCC Rcd at 19988 ¶ 27. A payment rule that requires a carrier to inquire of its customers as to the regulatory classification of calls made to a toll-free number in order to determine who is liable to compensate PSPs would violate this principle.

classified as “information services.” Therefore, a prepaid card service provider who offers “enhanced” offerings along with its telecommunications service will not lose its identity as a “Completing Carrier.” As a “Completing Carrier,” the prepaid card service provider can be held liable to pay compensation on calls accessing its “enhanced” offerings, as well as on calls completed to end users.

In any event, even if the Commission does determine that it must amend the compensation rule in order to find prepaid card service providers to pay compensation for information service calls, such an amendment can and should be adopted in this proceeding. *Notice* ¶ 38. (“Rather than continuing to address the appropriate regulatory regime for variations of prepaid calling cards in a piecemeal manner, we conclude that the public interest would best be served by considering this issue in a more comprehensive manner”). As discussed in Section III.A.4, the Commission has ample authority under either Section 276 or Title I to require prepaid card service providers to pay compensation for calls accessing their information service offerings.

B. A Call To An “Enhanced” Offering Is A Separate “Call”

In the *Notice*, the Commission has inquired what factors would be relevant in determining whether the Commission should assert exclusive jurisdiction over a prepaid card service. APCC does not take a position at this time on the question of whether the calls are subject to the Commission’s exclusive jurisdiction for purposes other than payphone compensation.

Embedded in the jurisdictional issue, however, is the question whether, when a caller dials a prepaid card service provider’s platform, dials a digit (or speaks a word) to access an information or function, and subsequently, without hanging up, places a

call to an end user, the two communications should be treated as two distinct calls for jurisdictional purposes, or as a single two-part “call.” *See Order* ¶¶ 23-26 (discussing whether a caller’s use of “enhanced” prepaid card services involves multiple “calls” and/or multiple “communications,” or only one “relevant” communication).

This issue is important with respect to payphone compensation because the amount of compensation paid depends on the number of “calls” completed from a payphone. If the Commission concludes that the communications described above constitute a single “call” for jurisdictional purposes, and applies the same definition of call to the payphone compensation context, then PSPs would be compensated for only one of the two communications and not the other.

As discussed above in note 12, there can be no doubt that, when a caller accesses a prepaid card service provider’s enhanced offering *and does not* subsequently complete a call to an end user, the call to the enhanced offering is an independent “completed” call for purposes of payphone compensation. It logically follows, therefore, that when a caller accesses an enhanced offering and *does* subsequently complete a call to an end user, there are two calls for purposes of payphone compensation. Given that the call to the information resource constitutes a distinct, independent call when the caller does not choose to make a subsequent call, there is no reason why that call should lose its identity as a distinct call merely because the caller *does* make a subsequent call.

In this regard, Variant 1 is significantly different from the service addressed in the *Order*. In the *Order*, the Commission found that, when a caller who does not dial additional digits is required to listen to an advertisement before placing a call, the listening to the advertisement should not be considered a separate call. The Commission reasoned that:

[A]ll calling card platforms engage in some form of communication with the calling party, and the Commission never has found this communication to be relevant for jurisdictional purposes. Under an end-to-end analysis, communication of the incidental advertising message embedded in the AT&T card here is no more relevant than the typical phrase, "Thank you for using AT&T."

Id. ¶ 23. The Commission added that "the only relevant communication in the case . . . is from the calling card caller to the called party." *Id.* ¶ 26.

In the case of Variant 1, by contrast, the caller's purposeful accessing of information or functions by dialing a digit *is* a "relevant communication" for jurisdictional purposes – one that is separable from any subsequent call to an end user. The caller is making a conscious decision to communicate with the platform for a purpose that may have nothing to do with any subsequent call placed by the caller to an end user. Whether the caller accesses an advertisement, seeks information on the number of minutes remaining on the card, or donates minutes to overseas military units, the caller is engaging in a transaction that is independent of any subsequent call to an end user. Therefore, the call to the advertisement or other platform function should be treated as a separate call from any subsequent call placed to an end user.

The fact that the caller does not hang up before placing a subsequent call has no bearing on whether there is one call or two. Many prepaid card service providers offer a "pound redial" option, in which a caller can place numerous calls from a platform without hanging up and redialing the platform. The Commission has previously ruled that each call made using "pound redial" is a separate call for payphone compensation purposes. *Tollgate Order*, 18 FCC Rcd at 20003 ¶ 52 n.153. It would be anomalous if two calls made to end users without hanging up were treated as separate calls, while the

combination of a call to an “enhanced” offering and a call to an end user was treated as only one call.¹⁵

C. Variant 2

As noted above, Variant 2 is a service in which transport for the call is provided using IP technology. For the reasons stated below and in the APCC Petition, there is no valid reason for classifying calls using prepaid card platforms any differently based on the use of IP technology to transport the call.

1. Variant 2 itself

In Variant 2 itself, a carrier “provide[s] transport associated with enhanced calling card calls over its Internet backbone network using IP technology.” *Notice* ¶ 38. The prepaid card calling services provided in Variant 2 generally would take the form of “IP-in-the-middle” transmissions, originating and terminating on the PSTN. As the Commission noted in the *Notice*, for 1+ calls that both originate and terminate on the PSTN, the Commission has already determined that:

[A]n AT&T voice service utilizing 1+ dialing from a regular telephone that is converted into IP format for transport over AT&T’s network and converted back into analog format for delivery through local exchange carrier lines is a telecommunications service.

¹⁵ Moreover, if the initial call to access an information resource or function is not an independent call, which of the subsequent calls using pound redial should it be combined with? There is no reason for considering the information call to be an integral part of the first subsequent call any more than for considering it to be an integral part of the second, third etc. subsequent calls. The only logical approach is to treat the initial information call as a separate call.

Notice ¶ 40, citing *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) (“*IP Telephony Order*”). There is no reason why the Commission’s analysis of “IP-in-the-middle” communications should be any different merely because the call is originated by means of a toll-free number instead of 1+ dialing.¹⁶ In the *IP Telephony Order*, the Commission explained that the use of IP technology did not affect in any way the fundamental nature of the 1+ service addressed in that *Order*:

Users of AT&T’s specific service obtain only voice transmission with no net protocol conversion End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T’s traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T’s specific service take place within its network, they appear to be “internetworking” conversions, which the Commission has found to be telecommunications services. We clarify, therefore, that AT&T’s specific service constitutes a telecommunications service.

IP Telephony Order ¶ 12 (citations omitted).

This description and analysis applies equally to prepaid card services. As in the *IP Telephony Order*, prepaid card calls transported using IP technology service have all the same characteristics (save the use of IP technology to transport them) as prepaid card calls using circuit-switched technology. End users “do not order a different service, pay different rates, or place and receive calls any differently than they do through . . . traditional circuit-switched long distance service.” *Id.*

¹⁶ The *Notice* does not suggest any reason why calls transported by means of IP should be treated differently depending on whether toll-free or 1+ dialing is used to initiate the call. *Notice* ¶ 40.

2. “IP-in-the-middle” analysis does not change when a SBR provides the platform

The same analysis would apply when switch-based resellers provide prepaid card services transported by “IP in the middle.” The Commission made clear in the *IP Telephony Order* that the logic and holding of that decision are not limited to the circumstance in which a single carrier performs an internal PSTN-IP conversion within its network and then reconverts the call for delivery. Rather, the analysis “applies to services that meet [the *IP Telephony Order*] criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.” *Id.* ¶ 19. Thus, “when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN,” the call is a telecommunications service. *Id.*

3. The fact that some payphone-originated calls using a prepaid card platform may terminate over IP facilities should not affect the analysis

In some cases, the called party for a call using a prepaid card service platform may be a person who has a broadband connection terminating in a computer or specialized IP-enabled telephone.¹⁷ In such cases, as a technical matter, the call may be said to undergo a “net protocol conversion.” In all other respects, however, this call would appear no different from the prepaid card calls that terminate over circuit-switched facilities. The payphone caller would dial a ten-digit toll-free number, reach a calling card or prepaid card platform, provide billing information, and dial the called

¹⁷ For calls originating from payphones, the *calling* party virtually always has a circuit-switched connection to the network.

party's ten-digit telephone number. The card holder would be billed in the same manner as in a PSTN-to-PSTN communication. In these and other respects, the communication would appear to the parties no different from the prepaid card calls described above.

In these cases, the fact that the call terminates on a broadband connection to a computer, specialized IP phone, or conventional CPE via a terminal adapter is wholly incidental to the nature of the service offered. Prepaid card services are typically intended to be used ubiquitously to call from any location to virtually anywhere in the world. When a call using one of these services happens to be terminated in IP, the fundamental character of the communications service remains unchanged. The same dialing patterns are used, the same billing arrangements apply, and there is no more deviation from straightforward two-way voice-only communications than there would be with an IP-enabled call that terminates as a circuit-switched call on the PSTN.

Although the Commission's rulings on classification of IP-enabled services do not directly address the regulatory classification of prepaid card calls that incidentally terminate in IP, the logic of those rulings compels a finding that these calls are telecommunications services. The Commission established the framework for its analysis in the 1998 *Stevens Report*.¹⁸ There, the Commission addressed phone-to-phone IP-enabled services and found, on the record before it, "that this type of IP telephony . . . bear(s) the characteristics of 'telecommunications services.'" *Id.* ¶ 89. While the *Stevens Report* did not specifically address PSTN-to-IP calls, all of the factors that the Commission identified as the basis for its finding phone-to-phone IP-enabled

¹⁸ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501 (1998) ("*Stevens Report*").

calls appear to be telecommunications are equally applicable to prepaid card calls that happen to terminate in IP. The Commission found phone-to-phone IP-enabled calls include services in which the provider meets the following conditions:

(1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does *not* require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan and associated international agreements; and (4) it transmits customer information without net change in form or content.

Id. ¶ 88.

Prepaid card calls that incidentally terminate over IP meet all four factors: they are voice calls, placed from a payphone, to a NANP number, and the “customer information,” i.e., the voice communication between the payphone user and the called party is transmitted without any change in form or content. While there is a net protocol conversion, the conversion does not change the form or content of the information. As the Commission found to be the case with phone-to-phone IP-enabled calls, “[f]rom a functional standpoint,” prepaid card callers “obtain only voice transmission, rather than information services such as access to stored files.” *Id.* ¶ 89. And, as with phone-to-phone IP-enabled calls, prepaid card service providers transmitting PSTN-to-IP dial-around calls “do[] not offer a capability for generating, acquiring, storing, processing [beyond the format conversion itself], retrieving, utilizing, or making available information.” *Id.*

Prepaid card calls that terminate over IP similarly meet all of the factors identified in the *IP Telephony Order*, again with the exception that there is a net protocol conversion. See *IP Telephony Order* ¶ 12. However, nowhere did the Commission say in the *IP Telephony Order* that, had there been a net protocol conversion, the service would

have been transformed into an information service. Indeed, it is apparent from the thrust of the Commission's discussion that phone-to-phone IP-enabled calls are a telecommunications service because they amount to no more than the simple transmission of voice communications between the caller and called party. This is equally true with respect to phone-to-IP dial-around calls.

As discussed in Section III.A.1 and III.A.2, the Commission has long held that where enhanced or information service functions are "incidental" to an underlying telecommunications service and do not alter their "fundamental character," the inclusion of such functions does not transform an otherwise basic service into an enhanced or information service.¹⁹ Similarly, the Commission has held that if a service involves net protocol conversion, but that net conversion serves to facilitate the piecemeal introduction of new technology into the PSTN and to maintain the compatibility of network services with CPE, then those net conversions are "outside the ambit of the enhanced [or information] services definition."²⁰

¹⁹ See, e.g., Order ¶16; *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528, 3531 ¶ 19 (1992) (validation and screening services are "incidental" to the provision of local exchange access service and therefore subject to Title II regulation); *NATA Order*, 101 FCC 2d at 359-361 ¶¶ 24-28 (1985) (services that "facilitate the provision of basic services without altering their fundamental character" are not considered enhanced services); *NATA Reconsideration Order*, 3 FCC Rcd at 4386 ¶¶ 8-9 (1988); *Beehive Telephone v. The Bell Operating Companies*, File No. E-94-57, Memorandum Opinion and Order, 10 FCC Rcd 10562, 10566 ¶ 21 (1995) ("services that are incidental or adjunct to the common carrier transmission service are to be regulated in the same way as the common carrier service"), *aff'd on remand*, Memorandum Opinion and Order, 12 FCC Rcd 17930 (1997).

²⁰ *Independent Data Communications Manufacturers Association, Inc., Petition for Declaratory Ruling That AT&T's Interspan Frame Relay Service Is a Basic Service*, 10 FCC

Moreover, for the same reasons given in Section III.A, above, if the Commission were to rule that prepaid card calling services should be classified as telecommunications services when a call terminates over circuit-switched facilities but as “information services” when a call terminates over IP, the result would be increased noncompliance with the payphone compensation scheme.

In short, the termination of a prepaid card call in IP is “incidental” to the telecommunications service provided, does not alter its “fundamental character,” and serves to facilitate the piecemeal introduction of packet switched technology into the network (by accommodating the fact that some CPE currently utilizes broadband, IP-based network connections while payphones generally do not yet use such connections). Given the noncompliance with the payphone compensation scheme that would result from ruling otherwise, the Commission should rule that a prepaid card calling service that occasionally terminates calls over facilities using IP technology is still a “telecommunications service,” not an information service.

4. If the Commission classifies prepaid card calls that incidentally terminate in IP as information services, the Commission must rule that such calls are nonetheless subject to payphone compensation, to be paid by the prepaid card service provider

Even if the Commission finds that prepaid card service calls that terminate in IP are “information services,” then for the reasons stated in Sections III.A.3 and III.A.4, the Commission must rule that the calls are subject to payphone compensation and that the prepaid card service provider is liable to pay the payphone compensation. Otherwise,

(Footnote continued)

Rcd 13717, 13719 ¶15 (1995); *see also Amendment of Section 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry), Phase II, Report and Order*, 2 FCC Rcd 3072, 3082 (1987).

in order to know who is responsible for paying compensation, it would be necessary to ascertain how the call was terminated in order to determine whether the carrier or its prepaid service provider customer has the responsibility to pay compensation for the call.

As noted in Section III.A.4, this determination is not feasible for the carriers that deliver calls to prepaid card service providers, or for the PSPs who must collect the compensation. Only the prepaid card service provider is well situated to track the call and determine whether, and how, the call was completed. Therefore, in order to avoid a breakdown in the payphone compensation system, the Commission should interpret the compensation rule to require prepaid card service providers, rather than the carrier delivering the call to the prepaid card service provider, to pay for calls completed to prepaid card platforms, if the Commission determines that some of those calls are "information services."

As discussed in Sections III.A.3 and 4, such an interpretation of the compensation rule would be reasonable and would not require a rule amendment. If necessary, however, the Commission could amend the compensation rule in this proceeding to require prepaid card service providers to pay compensation for information service calls, and would have ample authority to do so under either Section 276 or Title I of the Act.

D. To The Extent That The Commission Finds Providers Of "Enhanced Prepaid Card Services" Are Not Subject To Dial-Around Compensation Obligations, The Commission Must Rule That The Compensation Obligation Falls On The Carrier That Delivers A Call To The Prepaid Card Service Provider

If the Commission classifies some "enhanced prepaid card services" (whether based on Variant 1 or 2) as information services and rules that the prepaid card service

provider is not required to pay dial-around compensation for such information service calls, then the Commission must rule that the compensation obligation falls on the carrier that delivers the call to the provider of the prepaid card information service.

In adopting the current compensation rule, the Commission clearly intended to ensure that PSPs are compensated by some party for every dial-around call. It would be completely contrary to the Commission's intent, and the requirements of the Act, for the Commission to conclude that there are circumstances where none of the service providers involved in a call has any obligation to compensate the PSP. Therefore, if the Commission finds that the prepaid card service provider does not have a compensation obligation, the Commission must find that the obligation falls on the carrier that delivers the dial-around call to the prepaid card service provider.

This would be the result that most closely comports with the intent and language of the rule, if the Commission rules out the option of holding the prepaid card service provider responsible. The compensation rule requires a carrier to pay for calls that it completes. If the prepaid card service provider is not subject to a compensation obligation because it is not classified as a carrier, then the prepaid card service provider is effectively an "end user" customer of the carrier that delivered the call to the prepaid card service provider.²¹ Accordingly, the carrier that delivered the call to the prepaid card service provider would be the "Completing Carrier" who "completes" the call to the prepaid card service provider.

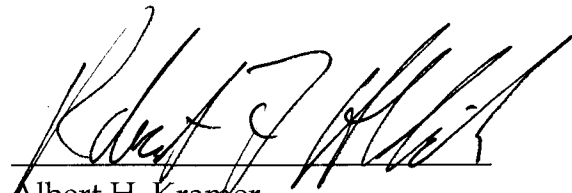
²¹ The Commission has long exempted information service providers from the payment of certain interstate access charges. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*; Order on Remand and Report and Order, 16 FCC Rcd 9151, 9158, ¶ 11 (2001) ("ISP Remand Order"); *see also Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16133, ¶ 344 (1997) (*Access Charge Reform First Report and Order*).

IV. OTHER

A number of possible variants of prepaid card services are discussed in Sections II and III of these comments. Other variants are possible; however, APCC believes that the same principles discussed in these comments would apply to such variants. First, classifying prepaid card services as "telecommunications services" is consistent with past precedent and would avoid encouraging noncompliance with the payphone compensation system. Second, in the event that some "enhanced" prepaid card offerings are classified as "information services," the Commission should clarify (1) that such "information service" calls are subject to payphone compensation and (2) that the prepaid card service provider is liable to pay the compensation. APCC will comment as necessary on other prepaid card services that may be discussed in the comments of other parties.

Dated: April 15, 2004

Respectfully submitted,

Handwritten signatures of Albert H. Kramer and Robert F. Aldrich, written in black ink over a horizontal line.

Albert H. Kramer

Robert F. Aldrich

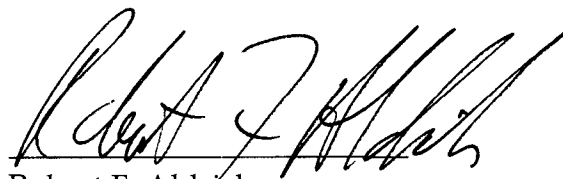
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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2004, the foregoing Comments of the American Public Communications Council was sent via electronic mail to the following:

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